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No. 93-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Petitioner's opening brief explained that the District of Columbia Circuit's rule requiring "direct" evidence of intent arbitrarily eliminates meritorious *Bivens* claims while furthering none of the goals of qualified immunity. Because "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence," *Holland v. United States*, 348 U.S. 121, 140 (1954), the rule randomly sacrifices legitimate civil rights claims, arising from the violation of clearly established constitutional guarantees, for reasons that are wholly unrelated to the strength of the claim. The rule represents the triumph of form over substance, allowing the most egregious wrongdoer to act with impunity while depriving his victim of the "very

essence of civil liberty [which] certainly consists of the right of every individual to claim the protection of the laws . . . ." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). So inescapable is this conclusion that even respondents acknowledge that the direct evidence rule "is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence." Resp. Br. 22.

Despite the illogic of the direct evidence rule, respondents assert it is nevertheless "impelled" by this Court's jurisprudence, specifically the decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Resp. Br. 21. But no decision of this Court requires the arbitrary standard that the District of Columbia Circuit applies to civil rights actions. To the contrary, the precedents of this Court require reversal of the decision below.

I. THIS COURT'S QUALIFIED IMMUNITY JURISPRUDENCE PRECLUDES A DIRECT EVIDENCE STANDARD

A. Respondents Distort the Necessary Balance Between The Rights of Citizens To Be Free of Constitutional Misconduct and the Qualified Immunity of Government Officers

This Court has long recognized that qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting [the] government's ability to perform its traditional functions." *Wyatt v. Cole*, 112 S. Ct. 1827, 1833 (1992). *See* Pet. Br. 21-22. In contrast to the balance this Court requires, respondents posit a standard that

would confer virtually absolute immunity on officials and would dismiss substantial claims of constitutional violations. To be sure, the qualified immunity granted to officials reflects important public policy considerations. Within the parameters of clearly established constitutional standards, public officials should be free to engage in the "'unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). In contrast to the public official's immunity, which "is grounded on principles of public policy" (Gov't Am. Br. 12), the plaintiff's right to seek redress for the violation of clearly established rights is rooted not only in sound public policy, but in the Constitution itself.

A remedy for constitutional wrongdoing responds to the manifest need to protect citizens from persons who, because they act in the name of the United States, "possess[] a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens*, 403 U.S. at 392. This need is particularly apparent in the prison context which, like any area of extensive government regulation and control, "offer[s] opportunities for unconstitutional action on a massive scale." *Butz v. Economou*, 438 U.S. 478, 506 (1978). There is, accordingly, no merit to respondents' contention that the public policy interests advanced by an official's immunity may "outweigh" the constitutional rights of *Bivens* plaintiffs. Resp. Br. 25.[1]

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1 The same standards of qualified immunity apply to *Bivens* and Section 1983 cases. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) ("[T]he 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials

Respondents' distortion of the requisite balance is not supported by policy, precedent, or the practicalities of government. As this Court made clear in rejecting many of the same arguments respondents assert: "We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

B. *Harlow v. Fitzgerald* Demands "Firm Application" of the Federal Rules of Civil Procedure, Not a "Direct Evidence" Pleading Standard

1. The dispute in this case stems largely from the parties' radically different interpretations of this Court's formulation of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Respondents contend that *Harlow* implicitly granted officials an "irrebuttable" presumption of good faith (Resp. Br. 18) and that the case "impels" erection of a heightened pleading standard that is mentioned nowhere in the case and can be satisfied only in the fortuitous circumstance where a claimant unearths direct evidence of intent without the benefit of discovery. *Id.* at 21.[2] Respondents would expand *Harlow* beyond recognition.

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guilty of the same constitutional transgression") (quoting *Butz*, 438 U.S. at 504).

[2] Respondents incorrectly suggest that the record in this case contains some 23 depositions. (Resp. Br. 10, 14, 15.) When the final brief on the qualified immunity motion was filed in the district court, petitioner had taken only *one* deposition. That witness was not a government employee. Brief excerpts of two other deposition transcripts were submitted to the court prior to its determination on the motion. The extensive factual discussion

Prior to *Harlow*, civil rights plaintiffs could defeat a claim of qualified immunity by alleging that the official knew that his or her action violated existing law, or that the action was motivated by malice. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 322 (1975) (public official liable if "he knew or reasonably should have known that the action he took...would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . .") At that time, it was generally accepted that issues involving state of mind were peculiarly unsuited for summary determination. Accordingly, the Court observed in *Harlow* that "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." 457 U.S. at 816. Concerned that "bare allegations" of malice would suffice to usher defendants to trial, the Court made an official's subjective knowledge of governing law irrelevant to the qualified immunity analysis. *Id.* at 817. It held that, regardless of the official's subjective knowledge of the law, he or she is entitled to immunity so long as his or her conduct does not violate "clearly established" constitutional rights of which a reasonable official would have known. *Id.* at 818.[3]

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contained in petitioner's opening brief rests solely on the actual record before the district court at the time it rendered its decision.

3 There is no issue before the Court in this case concerning whether the rights were clearly established. The district court correctly held that it was clearly established that prisoners have a constitutional right to be free of content-based restrictions on speech and respondents did not contest that point in the court of appeals. Accordingly, respondents' references (Resp. Br. 33-34) to

The ***only*** subjective issue *Harlow* addressed was the official's knowledge of the state of the law. There is, therefore, no merit to respondents' argument that this Court's concern over "bare allegations of malice" should be interpreted to "impel" a direct evidence standard when weighing the sufficiency of the factual evidence against defendants. Nothing in *Harlow* suggests the application of any heightened pleading standard, let alone one that prohibits reliance on circumstantial evidence of intent. "Neither *Harlow* nor this Court's other immunity decisions resolved the issue of how to treat cases in which a plaintiff's allegation of improper motive or malice is an element of the claimed constitutional violation and a qualified immunity defense is raised." Gov't Pet. Am. Br. 12 n. 9. Far from providing the impenetrable shield respondents suggest, *Harlow* expressly reiterated the importance of "damage actions against high officials" and sought to maintain a "realistic avenue for

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this issue are both untimely and insubstantial. With regard to the constitutional rights asserted in the complaint, this Court has long held that prison regulations must "operate[] in a neutral fashion, without regard to the content of the expression . . . ." *Pell v. Procunier*, 417 U.S. 817, 828 (1974). *See Turner v. Safley*, 482 U.S. 78, 89-90 (1987); *see also Brooks v. Andolina*, 826 F.2d 1266, 1268 (3d Cir. 1987); *Cavey v. Levine*, 435 F. Supp. 475 (D. Md. 1977), *aff'd mem.*, 580 F.2d 1047 (4th Cir. 1978); *Burnham v. Oswald*, 342 F. Supp. 880, 889 (W.D. N.Y. 1972). As the district court observed, it was clearly established prior to November 1988, that "federal prison inmates have a First Amendment right to be free from governmental interference with their contacts with the press if that interference is based on the content of their speech or proposed speech." Pet. App. 47a. In short, "[p]rison walls do not form a barrier separating inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. *See* Pet. Br. 9 n.6.

vindication of constitutional guarantees." 457 U.S. at 809, 814.

Respondents complain that, in the absence of an insurmountable direct evidence standard, public officials face a threat of liability when they act contrary to clearly established rights. But, "this is precisely the point of the *Harlow* standard: 'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he ***should*** be made to hesitate . . . .'" *Mitchell*, 472 U.S. at 524 (quoting *Harlow*, 457 U.S. at 819) (emphasis added by the Court). Under a "direct evidence" standard, in contrast, officials may knowingly and willfully violate clearly established constitutional rights with impunity so long as they do not voluntarily confess to wrongdoing. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("Requiring 'direct' evidence of intent would be fatal in all but the rare case in which the defendant confessed"), *cert. denied*, 502 U.S. 1121 (1992); Pet. App. 18a (Williams, concurring) (same). *Harlow* neither compels nor even supports that result.

2. Four years after *Harlow*, this Court held that factual issues concerning state of mind are as susceptible to summary judgment determinations as any other factual issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In *Anderson*, this Court flatly rejected the argument that "the defendants should seldom, if ever, be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue." *Id.* at 256. To defeat a motion for summary judgment where state of mind is at issue, the Court explained, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be

evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. To avoid summary judgment, the plaintiff must offer "concrete" and "affirmative" evidence that points to unlawful intent or face dismissal. *Id.* at 257. A plaintiff "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial." *Id.* at 248. In light of *Anderson*, there is far less basis for concern than there was when *Harlow* was decided that insubstantial claims implicating a defendant's intent will necessarily proceed to trial.

Since this Court's decision in *Anderson*, the lower courts have carefully scrutinized allegations of improper motive or intent and have granted defendants' motions for summary judgment where plaintiffs offer only "bare allegations." *See, e.g., In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) (upholding summary judgment on scienter issue), *cert. denied*, 496 U.S. 943 (1990); *Clements v. County of Nassau*, 835 F.2d 1000, 1006 (2d Cir. 1987) ("summary judgment is appropriate even when state of mind is at issue"); *Barss v. Tosches*, 785 F.2d 20, 23 (1st Cir. 1986) (a party against whom summary judgment is sought is not entitled to trial "'simply because he has asserted a cause of action to which state of mind is a material element. There must be an indication that he can produce the requisite quantum of evidence to enable him to reach a jury with his claim'") (quoting *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied*, 426 U.S. 904 (1976)); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.) ("The summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion."), *cert. denied*, 474 U.S. 829 (1985).

Thus, after *Anderson v. Liberty Lobby*, "bare allegations" of malice no longer suffice to usher public officials (or any other defendants) to trial. Insubstantial damages suits involving constitutional violations "need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity" and "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz*, 438 U.S. at 508. Special pleading or production rules are neither essential nor warranted to protect officials from the undue distractions of court proceedings in insubstantial cases.

Petitioner has more than satisfied the appropriate standard.[4] His claim should be permitted to proceed.

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4 Respondents' brief joins issue on a number of factual contentions that confirm the inappropriateness of summary judgment. Respondents' contention (Resp. Br. 34) that Quinlan's intervention permitting NBC News to interview petitioner "completely undermines" the allegation that his subsequent actions were taken to stifle petitioner's speech ignores Quinlan's admission that petitioner's perceived "lack of credibility, and the likelihood of unnecessarily precipitating a 'cover-up' story just before the election, were major factors in the decision to permit the original NBC interview." CA App. 94. Similarly, respondents' contention that "petitioner had access to, and utilized, the telephone" during his detention (Resp. Br. 34) ignores the order that issued when petitioner attempted to use the phone: "NO! MORE PHONE CALL FOR THIS INMATE, per Lt. Garvue." CA App. 87. Moreover, the government's contention that it was not until after the district court ruled on the qualified immunity motion that petitioner disclosed that he was permitted to call Nina Totenberg (Gov't Am. Br. 6 n.5) is inaccurate. The information was contained in petitioner's complaint (Pet. Br. App. A9) and in a declaration of Ms. Totenberg submitted in opposition to the motion for qualified immunity. CA App. 80 ("It was a fairly acrimonious conversation and I demanded that Kimberlin be

3. There is no merit to respondents' even more extreme argument that *Harlow* "could -- and perhaps should -- be read to bar a plaintiff from even bringing a *Bivens* suit that turns solely on a public official's allegedly unconstitutional motive." Resp. Br. 18. That argument contradicts this Court's precedents, and every court that has addressed the question has expressly rejected respondents' contention. As the Solicitor General has observed: "Like all other circuits that have considered the question, the District of Columbia Circuit considered and rejected the notion that *Harlow's* statement that 'bare allegations of malice should not suffice to subject government officials to the costs of trial or to the burdens of broad-reaching discovery,' 457 U.S. at 817-18, rendered defendants completely immune from intent based constitutional damage claims." Gov't Am. Br. 16 n. 14. *Harlow* itself, which involved an alleged retaliatory termination of employment, turned on the official's motive. By no reasonable stretch can it be said, therefore, that *Harlow* supports a ban on unlawful motive cases.

Far from precluding inquiry into the state of mind of public officials, this Court recently held that a plaintiff bringing an Eighth Amendment claim must prove that the "prison official [had] a 'sufficiently culpable state of mind.'" *Farmer v. Brennan*, 114 S. Ct. 1970, 1977 (1994). To violate the Cruel and Unusual Punishment clause of the Eighth Amendment, prison officials must be subjectively aware of a serious risk to an inmate. "[T]he official must be both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also

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permitted to call me so that I could make sure he was alright. He was taken to a phone and did call me and he was alright.")

draw the inference." *Id.* at 1979. The Court also ruled in *Farmer* that the official's state of mind was "subject to demonstration in the usual ways, including inference from circumstantial evidence . . . ." *Id.* at 1981. Respondents' incorrect reading of *Harlow* is inalterably contrary to *Farmer*. In effect, respondents contend that *Farmer* should be overruled and no Eighth Amendment claim could ever be brought because liability turns on the subjective intent of officials. Neither *Harlow* nor the Constitution permits that result.

C. The Direct Evidence Rule Furthers No Legitimate "Extrinsic Policy Considerations"

Respondents seek to defend the direct evidence rule by equating it with the attorney-client and marital communication privileges, and other rules excluding types of evidence to further "extrinsic policy considerations." Resp. Br. 25. Those other privileges are designed to, and do, advance specific policy objectives. But, the direct evidence rule does not advance the legitimate policy objective of filtering out insubstantial cases; it randomly eliminates *Bivens* suits based solely on the form of evidence. *See, e.g., Tompkins v. Vickers*, 26 F.3d 603, 609 (5th Cir. 1994) ("direct evidence of an improper motive is usually difficult, if not impossible, to obtain. Thus, requiring direct evidence would effectively insulate from suit [defendants] who deny an improper motive in cases such as this."). *See also* Resp. Br. 22 (direct evidence standard "is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence.").

The direct evidence standard is particularly invidious in the context of intent issues. As this Court

has recognized, circumstantial evidence is typically the only indication of state of mind. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n. 30 (1983) (proof of scienter "is often a matter of inference from circumstantial evidence.") *See* Pet. Br. 29.

Respondents are able to muster a single case for the proposition that direct evidence of intent is not "impossible to obtain." Resp. Br. 24. That example, *Davis v. Passman*, 442 U.S. 228 (1979), merely underscores how extreme the direct evidence standard is and how rarely it can be satisfied. In *Davis*, a United States Congressman fired a staff member and subsequently wrote her a letter acknowledging that, although she was "'able, energetic and a very hard worker,'" it was "'essential that the understudy to my Administrative Assistant be a man.'" *Id.* at 230. In short, the defendant voluntarily admitted to violating a clearly established constitutional right. If *Davis* represents the standard, only the most selfless, remorseful or obtuse could be held liable, and that liability would be so certain and undisputed in every case that discovery would be unnecessary and ***plaintiffs*** would prevail on summary judgment.

For these very reasons, the direct evidence rule correctly has been rejected by every other court of appeals that has considered it[5] and has been criticized

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5 *See Tompkins*, 26 F.3d at 608-609; *Elliott*, 937 F.2d at 345; *Branch v. Tunnell (Branch I)*, 937 F.2d 1382, 1386-87 (9th Cir. 1991), *cert. denied*, 114 S. Ct. 2704 (1994); *Crutcher v. Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989).

by several members of this Court.[6] These same reasons warrant reversal of the judgment below.

II. THE FEDERAL RULES OF CIVIL PROCEDURE PRECLUDE A DIRECT EVIDENCE STANDARD

1. A further infirmity in the decision below is the erection of a "heightened pleading" standard that is contrary to the Federal Rules of Civil Procedure and this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 113 S. Ct. 1160 (1993). This Court unanimously held that heightened pleading standards are "impossible to square" with the "liberal system of 'notice pleading' set up by [Fed. R. Civ. P. 8(a)]." *Id.* at 1163. The District of Columbia Circuit's heightened pleading standard "is a departure from the usual pleading requirements of Fed. R. Civ. P. 8 and 9(b)." *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring). The direct evidence rule "departs also from the normal standard for summary judgment under Rule 56." *Id.* (Kennedy, J., concurring). There is no basis for carving out an exception applicable only to *Bivens* cases because, by their express terms, the Federal Rules of Civil Procedure govern in "all suits of a civil nature." Fed. R. Civ. P. 1. Consequently, the direct evidence rule is precluded by the plain language of the Federal Rules. Even if some conceivable policy objective were furthered by a direct evidence rule, this Court has made clear that such exceptions can be created only by amending the Federal Rules, not by

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6 *See Siegert v. Gilley*, 500 U.S. 226, 235-236 (1991) (Kennedy, J., concurring); *Id.* at 246 (Marshall, J., joined by Blackmum and Stevens, JJ., dissenting).

judicial fiat. "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 113 S. Ct. at 1163.[7]

2. Respondents have no effective answer to the argument that full use of the existing Federal Rules of Civil Procedure provides ample protection to federal officials without arbitrarily sacrificing meritorious *Bivens* claims. *See* Pet. Br. 38-39; Gov't Am. Br. 20, 29; ACLU Am. Br. 8. Indeed, respondents ignore altogether the latitude district courts have to fashion suitably limited discovery programs under Rules 16, 26(b) and (c) and 37; nor do they address the further safeguards against frivolous claims that exist in Rule 11 and 28 U.S.C. § 1915 (d).[8]

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7 Nor is there any merit to respondents' argument that qualified immunity "trumps" the Federal Rules because it is a "substantive right." Resp. Br. 28. Respondents are incorrect because they would create an imbalance detrimental to plaintiffs with meritorious constitutional claims. "[I]t is hard to depict a 'right not to be tried' as substantive; it sounds distinctly procedural," and the substantive right "belongs to the plaintiff." *Elliott*, 937 F.2d at 338, 345. In any event, where qualified immunity applies, it confers only a procedural right to avoid trial of insubstantial claims. *Harlow*, 457 U.S. at 816.

8 There is no merit to respondents' proposed "clear and convincing evidence" standard as a threshold evidentiary requirement to be met prior to discovery, on summary judgment, or even at trial. The unprecedented standard respondents advocate has no application to issues of intent. Rule 9(b) of the Federal Rules requires a lower standard for pleading state of mind: "[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). And this Court has held that, "if anything, the difficulty of proving the

A recent en banc decision of the United States Court of Appeals for the Fifth Circuit forcefully confirms that special exceptions to the Federal Rules of Civil Procedure are unnecessary and that the district court "has an array of procedures that will carry the load as far as pleadings can." *Schultea v. Wood*, No. 93-2186, 1995 U.S. App. LEXIS 4673, at *20 (5th Cir. Mar. 9, 1995). In *Schultea v. Wood*, the Fifth Circuit held that courts may employ Rule 7(a) to assure that federal officials are not brought into court on the basis of mere "base allegations" of unlawful motive. "When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail." *Id.* at **17-18. As the court explained, district courts need not allow any discovery unless plaintiff has supported his claim with "sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts." *Id.* at *20.

The protections contained in the Federal Rules strike the appropriate balance between the legitimate interests of plaintiffs and defendants in *Bivens* cases. In view of the substantial evidence of respondents' pretextual and shifting explanations, violations of regulations, injurious actions and inappropriate influences (*see* Pet. Br. 2-14), petitioner's claim should be permitted to proceed.

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defendants state of mind supports a *lower* standard of proof." *Herman & MacLean*, 459 U.S. at 390-91 n.30 (emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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